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No. 91-1618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,
v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPELLEES' BRIEF

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QUESTIONS PRESENTED

In circumstances where black voters have consistently been able to elect or influence the election of black and white legislators of their choice through coalitional voting with white voters, is the Voting Rights Act violated by an apportionment plan which packs, fragments and segregates black voters for political gain?

Relying upon the federal supremacy of the Voting Rights Act, may a state apportionment board depart from state law and adopt a "policy" of maximizing majority-minority legislative districts statewide where there is no proof of legally significant racial bloc voting or inability of black voters to elect representatives of their choice? May a state apportioning board, in such circumstances, rely upon the federal supremacy of the Voting Rights Act to adopt a "policy" of guaranteeing safe seats for black candidates?

Where Section 5 of the Voting Rights Act is not applicable, does a state apportionment board possess the unreviewable discretion to apply Section 5 remedies on a statewide basis?

Whether the trial court properly found that the Appellants deliberately packed and fragmented black voters for the purpose of destroying coalitional voting of black and white voters in Ohio in violation of the Fifteenth Amendment.

Whether the trial court properly found that the Ohio Apportionment Board departed from the 10% total population deviation in legislative districts in violation of the Fourteenth Amendment of the United States Constitution.

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L. Atwater, *Altered States: Redistricting Law & Politics in the 1990s*, 6 J.L. & Pol. 660, 668 (1990) 20

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Bernard Grofman et al., *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 Law & Pol'y 199 (1985) 38

STATEMENT OF THE CASE

On November 1, 1991, Speaker pro tempore Barney Quilter and Auditor Thomas Ferguson, members of Ohio's Apportionment Board, along with minority and white citizens and legislators, filed this action against Governor George Voinovich, Secretary of State Robert Taft and President of the Senate Stanley Aronoff, majority members of the Apportionment Board (Board majority).

Appellees requested a declaratory judgment that Appellants misused the Voting Rights Act by aggregating black voters in single member districts as a remedy for unsubstantiated allegations of existing minority vote dilution. The complaint also sought a declaratory judgment that the apportionment plan adopted by the Board majority violated the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments to the U.S. Constitution. J.A. 1; D. 1, at 22.[1]

On January 31, 1992, the trial court found that the plan violated the Voting Rights Act, remanded the plan to the Board for further action, and took no action on the Fourteenth or Fifteenth Amendment claims. App. A at 14-15a. No appeal was noted from the January 31, 1992 Opinion and Order.

Pursuant to the remand, on February 18, 1992, the Board majority issued "technical amendments" to the 1991 plan. By its Orders of March 10 and March 19, 1992, the trial court found that the amended 1991 plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments. App. C at 119a; App. D at 141-42a, 148a.

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[1] For consistency, the following citation abbreviations are used throughout the brief:

App. Appendix to Jurisdictional Statement
J.A. Joint Appendix
D. Docket Number (see attached Appendix for index)
Ex. Exhibit Number

A. The Voting Strength of Blacks in Ohio Prior to the Adoption of the 1991 Plan

This case involves the decennial redistricting of Ohio and more particularly the redistricting of the black voting populations in Ohio's six major cities—Cleveland, Columbus, Cincinnati, Dayton, Toledo and Akron. Presently, eleven black legislators elected from those cities serve in the Ohio House of Representatives.[2] Each of them is a Democrat elected with large vote pluralities, and each has received the sustained benefit of substantial white crossover voting. J.A. 308.

The previous legislative districts in which these legislators were elected were drawn under the provisions of Article XI of the Ohio Constitution. Though silent on the subject of race, Article XI requires adherence to existing legislative boundaries if those boundaries can reasonably be maintained in light of population changes. App. I at 282a (§ 7(D)). According to the 1990 census, the total population of Ohio is 10,847,115 and its black population is 1,154,826, or 9.39%. D. 131 at 1. Since the eleven minority legislators comprise more than 10% of the total membership of Ohio's ninety-nine member House, minorities have maintained slightly greater than proportional representation in the House merely by historical adherence to the provisions of the Ohio Constitution.

Evidence presented to the trial court established that:

1. Coalitional voting historically has been the rule, not the exception in Ohio and racial bloc voting has not prevented blacks from electing both black and white candidates of their choice. App. D at 132-33a; J.A. 142-43; *see* Charts A & B (Charts A, B & C are included in the attached Appendix).[3]

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[2] The eleven minority legislators form an integral part of the legislative leadership of the House. One of the named plaintiffs, William Mallory, is black and has served as majority leader of the Ohio House for 18 years.

[3] Tilling admitted that each of Ohio's eleven black legislators are the representatives of choice of the voters from their districts. J.A. 23-24.

2. Blacks have been elected to the Ohio House of Representatives whenever the black population of a district exceeded 35%. App. D at 141a & n.5; J.A. 308.[4]

3. The average proportion of whites voting for Ohio's black legislators exceeded fifty-six percent in the years 1984-1990. App. D at 133a n.3; App. H at 223-24a.

4. Where blacks form more than 10% of the district's population, they regularly have been able to elect or affect the election of black and white legislators with or near 100% voting records on bills of particular minority interest. J.A. 164-65; *see* J.A. 178-81, 332.

5. On forty-nine bills of particular importance to blacks, selected by BEDO, an organization of black elected officials, Democrats on average voted favorably to black interests 95%, as contrasted with only 64% by the Republicans. J.A. 196.

6. Where blacks form 13% or more of a legislative district's population in Ohio, the election results historically have been 100% favorable to Democratic legislators. J.A. 164-65, 178-81; D. 147, Ex. C at 66 (Tilling expresses his agreement).

7. Where blacks form 10% or more of the district's population, election results are 95% favorable to Democrats, and below 10%, the election results are mixed, with Republicans being as likely to be elected as Democrats. *Id.*

8. Of the eleven black legislators currently serving in the House, four were elected from districts exceeding 51% of the black population; four were elected from districts with 42 to 50%; and three were elected from districts with less than 39%. J.A. 308.

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[4] Tilling agreed that "this is a fact" in Ohio. D. 147, Ex. C at 66. In the past twenty years, only one Senate District did not elect a black representative although its population exceeded 35%. App. D at 141a n.5, J.A. 102-03.

B. The Apportionment Process Immediately Preceding Adoption of the 1991 Plan

Appellants Voinovich, Taft and Aronoff delegated substantially all of their authority and discretion to Appellant James Tilling, the Secretary to the Board, adopting the plan he presented without any changes.[5] Tilling personally drew or approved each boundary line for the 1991 plan and its "technical amendments" and from the outset served as the Board majority's spokesman on all matters concerning the boundaries they adopted. J.A. 15-16; D. 102 at 72-73, 95-96. He prepared for the 1990 apportionment process by attending meetings with Republican strategists where the subject of maximizing majority-minority districts for political gain was discussed. J.A. 29-30. Tilling also conferred with the Ohio Republican Chairman, Mr. Bennett, on the beneficial political effects of maximizing majority-minority districts in Ohio. D. 103 at 50, 54-55, 58-60. He lectured at national seminars before Republicans on creating a record and building a case to meet Voting Rights Act legal challenges. J.A. 30-31, 65-66. Benjamin Ginsberg, the general counsel of the Republican National Committee, referred to Tilling as a "wily" campaigner, whose views should be heeded concerning the application of the Voting Rights Act. J.A. 65-66.

Tilling used the fifteen public meetings held throughout the state as a platform to explain the Board's legal

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[5] The only instruction Tilling, a non-lawyer, received from the Board majority who are all lawyers, was to follow the Voting Rights Act and the United States and Ohio Constitutions. D. 103 at 57. Aronoff gave Tilling no specific directions, did not speak to him about the lines Tilling ultimately drew and was not aware of whether a racial bloc voting analysis was done. J.A. 80-81. Taft said that Tilling did not report to anyone on the Board, that there was no method for monitoring his progress, that Tilling made his own analysis and that Tilling was an authority on reapportionment. J.A. 82-84. Voinovich saw the plan for the first time at the Apportionment Board meeting when it was adopted. Tilling told him it was within the framework of the Constitution and he relied on Tilling. J.A. 232-34.

obligations under the Voting Rights Act. Representative statements which he made include: "The courts have said wherever you can create a majority-minority district, you must do so, it's just that simple." J.A. 279; Appellants' Brief at 6 n.6. *Accord*: J.A. 279-83; D. 154 (transcripts of public meetings). "There is absolutely no doubt in the mind of anyone who has followed this process through the courts that we are under a mandate that wherever a majority-minority district can be created, that must be done. It is beyond the realm of discussion." J.A. 279. On the totalities of circumstances issue he said that, "[w]e need to establish for the record the totality of the circumstances in each urban area in order for us to do our job correctly . . . ." J.A. 284.

Tilling did no specific studies of the six urban communities where the majority of Ohio's black population is located. J.A. 28. The district court found that the transcripts of these public meetings shows a "paucity of information on these [Voting Rights Act] factors in the record. Of the information available, much was anecdotal and seems to be culled from Tilling's personal experience rather than from community sources." App. A at 13a. Tilling exhibited no awareness of the differing obligations of jurisdictions covered by Section 5 of the Voting Rights Act versus those not covered, nor the differing obligations where Voting Rights Act violations under Section 2 are proven and where they are non-existent.

The database Tilling used permitted him to calculate black populations and black voting age percentages by district, ward and precinct. In each urban area, Tilling's first step, as evidenced by his handwritten notes, was to use this data to draw districts by aggregating black populations on his computer and drawing lines around those populations. J.A. 15-16, 58-64. This database, which was stipulated into evidence, also provided a political index showing the results of the 1990 Ohio elections by district, ward and precinct in races for governor, secretary of state and auditor. J.A. 20; D. 131 at 2; *see* J.A. 41-43. In addition, public records of the results of all

Ohio elections were available to Tilling as were the roll call votes of individual legislators on bills involving issues of specific concern to the minority community. J.A. 9, 25.

Neither Tilling nor his staff performed any regression analysis to determine if racially polarized voting existed in any of the minority districts he redesigned. J.A. 12; App. A at 12a. Although he stated that he examined the racial voting patterns for minority legislators, he did not reduce his calculations or conclusions to writing. J.A. 10-11; App. A at 12a. In response to the question of whether this data disclosed legally significant racial bloc voting he could not give an unequivocal answer but stated that "what we did find was that given the opportunity there is a much higher percentage of black vote for black candidates than white vote for black candidates." J.A. 12. Tilling concluded and testified that racial bloc voting existed but also testified that he was aware that blacks had been consistently elected from districts with as low as 35% black population. J.A. 11-12, 24; App. A at 12-13a.

Tilling did not examine the voting record of any elected representatives to determine his or her responsiveness to the particularized needs of the minority community. J.A. 24-25; App. A at 13a. He stated that he reviewed voting records prepared for previous Senate campaigns and that this was "part of my mental equipment as I began this process." D. 102 at 180-81; App. A at 13-14a.

While Tilling was in the process of drawing the 1991 plan he received "Republican Opportunities," a document setting forth a strategy as to how the Republicans could gain control of Ohio's House of Representatives, the principal political objective of the Ohio Republican Chairman. J.A. 32-35.[6] The strategy recommended by "Republican Opportunities" was to "[p]ack as many Demos [Democrats] as possible into . . . Black-majority inner-city HDS

[6] "Republican Opportunities" was written by David Horn, Director of the Center for Research into Governmental Processes, Inc., an Ohio non-profit organization.

[House Districts]" and divide the remaining Democrats evenly in Republican-dominated districts. J.A. 39; see J.A. 100. Republican Representative Lawrence delivered this document to Tilling and he told her that he found it interesting but that there were problems in creating Senate districts the way the document described. J.A. 32-36; D. 111 at 48-51. Tilling's testimony that he lacked the time to present the document to the Board majority is irrelevant since they delegated the decision making and line drawing to him. Tilling requested a copy precisely to see what a Republican gerrymander would look like. J.A. 33-34.

"Republican Opportunities" was based upon an earlier 1990 document that also came from Tilling's files entitled "Let's Pretend," which he also admitted reading. D. 104 at 18-19. "Let's Pretend" shows how the districts would actually be configured and what the packed minority population figures would be in each district. J.A. 47. Again, the same strategy was recommended—" 'pack' as much of the Democrat minority [blacks] as possible into . . . heavily Democratic districts with Black majorities [and] fragment the remaining Democrats into . . . Republican-dominated districts . . . ." J.A. 49-52. The black population percentages in "Let's Pretend" correlate to or are somewhat lower than the percentages ultimately adopted by the Appellants in the 1991 plan. *Compare* J.A. 47 *with* J.A. 305-08.

Prior to drawing final boundaries, Tilling, on behalf of the Ohio Senate majority, entered into a contract with Floyd Johnson, a member of the Ohio NAACP. J.A. 17. In exchange for $10,000.00 Johnson agreed to "[m]inipulate [sic] lines for new Ohio State Representative districts in those counties where their [sic] is significant minority voting population." J.A. 77-78. Johnson drew legislative boundaries by surrounding the significant minority voting population in each of the urban areas. He testified that he maximized majority-minority districts solely for the purpose of ensuring the election of black

representatives in Ohio. J.A. 71. However, he did no regression analysis, testifying that he did not know what it is, nor did he examine the voting records of any legislators before drawing his minority districts. J.A. 70-71, 73, 75-76. Tilling did not inform Johnson about the configuration of the districts Tilling drew surrounding Johnson's districts, nor was it of any significance to Johnson. J.A. 71.

In drawing these districts, Johnson was acting on his own and *not* on behalf of the NAACP. J.A. 67.[7] Individuals associated with the Ohio Republican Party assisted, urged and directed Johnson to increase the black population in the districts he drew. J.A. 67-70, 73-74. Tilling testified that he accepted Johnson's districts in each of the urban areas and incorporated them into the 1991 plan adopted by the Board majority.

C. The Effects of the 1991 Apportionment Plan and Its "Technical Amendments"

1. *The 1991 Plan*

Of the ninety-nine House Districts in Ohio, forty-four of the 1981 districts were unaffected by population changes to the extent that they were within the permissible population range mandated by the Ohio Constitution and had the potential to be retained. App. I at 280-81a (§§ 3-4); J.A. 187-88.[8] Appellants ignored the directive

[7] Moreover, Tilling knew that Johnson was acting on his own accord and *not* in conjunction with the NAACP. Tilling understood from the NAACP that as long as Johnson did not represent that he was working on behalf of the NAACP or that the work performed by Johnson was the NAACP's, there would not be a conflict of interest. J.A. 18. Johnson, on behalf of the state NAACP endorsed Tilling's plan at the February 18, 1991 hearing, but stated that he was not speaking on behalf of the national NAACP. D. 147, Ex. C at 72, 75.

[8] Thirty-one of these districts were maintained in Appellees' "7D plan" submitted to the Board on February 18, 1992. D. 147, Ex. C at 32-37.

of Article XI of the Ohio Constitution that "[i]n making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 [relating to population] of this Article." App. I at 282a (¶ 7(D)). The 1991 plan preserved only seven of the pre-existing districts. J.A. 295. All of the districts represented by minority legislators were reconfigured by the 1991 plan even though four of those districts had the necessary population to be preserved. J.A. 296, 308.

As a result of maximizing the number of majority-minority districts wherever possible: (1) nine majority-minority districts were created where previously there had been four; (2) where formerly there had been twenty-three districts with black population between 10 and 50% the 1991 plan created eleven; and (3) where there had been twenty-two districts of less than 10% black population the 1991 plan created thirty-one. J.A. 198-99. In nine districts, Appellees asserted a Voting Rights Act violation alleging that the 1991 plan packed and fragmented minorities, thus either wasting or nullifying their voting strength. *See* Charts A & B. Black populations were aggregated into districts where minorities were electing candidates of choice with substantial white crossover vote and fragmented into districts with less than 10% population. *Id.*

The total black population in each of the nine districts was split into separate segments and each segment was placed into separate districts in the 1991 plan. *Id.* For example, looking at Chart A, 1981 House District 29 was split into five segments with its black population dispersed into 1991 Districts 21, 22, 25, 26 and 27 in the 1991 plan. Thus, that segment of the black population dispersed into 1991 District 27 is now part of a district with 3.5% black population; previously these voters were in a district containing 38.5% black population and were able to elect a candidate of their choice. Similarly, the districts with more than 10% black population which

elected white representatives who were 90 to 100% responsive to issues of particular concern to the minority community also were packed into heavy black districts or fragmented into districts with less than 10% black population. *See* Chart B.

The following is a summary of Tilling's answers on *direct* examination, stating why he changed the legislative boundaries of specific black legislators.

a. *Representatives Miller and Beatty (Franklin County—Columbus)*

Tilling admitted that Representative Miller's district did not need to be reconfigured to meet population changes pursuant to the Ohio Constitution. D. 123 at 87. Nevertheless, his district was changed to increase black population from 38.5% to 48%. *See* Chart C. Representative Beatty's district was increased from 46.8% to 55.9%. *Id.* Tilling admitted that in deciding the question of whether there was minority vote dilution that justified the application of the Voting Rights Act in Franklin County he made "a judgment call." D. 123 at 102. Although he acknowledged that black voters have had the opportunity in Franklin County to elect the candidate of their choice, he was concerned that either Representative Miller or Representative Beatty might desire to run for a different office. Since either Miller or Beatty or both of them might not continue to serve, Tilling reconfigured both districts relying for his authority on his interpretation of the Voting Rights Act. *Id.* at 102-03. "Obviously we tried to configure both of them to comport with our understanding of both population movements within the county and the Voting Rights Act and tried to make sure that both districts had a substantial component of minority population." *Id.* at 87.

b. *Representatives Mallory and Rankin (Hamilton County—Cincinnati)*

Tilling decided that the black population of Representative Mallory's district should be increased from 45.9% to

59.8% since Mallory was "in his 60's" and Tilling "look[ed] ahead to the time when perhaps Representative Mallory would not be there and running for reelection." *Id.* at 107; *see* Chart C. He relied upon the Voting Rights Act for his authority to make this increase in order to avoid "minority vote dilution." D. 123 at 105. Representative Mallory objected to the increase in the black population in his district. *See* D. 147, Ex. B at 87.

Tilling's reliance upon the Voting Rights Act to increase Representative Rankin's district from 53.2% to 61.1% was based on the fact that this figure was recommended to him by Floyd Johnson. D. 123 at 106.[9]

c. *Representative Jones (Lucas County—Toledo)*

Representative Jones' district did not need to be redrawn under the Ohio Constitution because of population requirements. J.A. 206; App. H at 174a. Nevertheless Tilling redrew that district, increasing black population from 41.7% to 50.6% (*see* Chart C), relying upon the authority of the Voting Rights Act. "Casey is a black Democrat from Lucas County, [his district] met the requirements populationwise [of the Ohio Constitution] but again did not contain as much of the minority community as we believed could feasibly be included." D. 123 at 89. Yet, Tilling admitted that Representative Jones would have no difficulty getting elected as long as he continued to run. *Id.* at 90.

d. *Representative Sykes (Summit County—Arkron)*

None of the districts in Summit County, including that of Representative Sykes, needed to be changed because of the Ohio constitutional population requirements. J.A. 206;

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[9] Tilling testified that this figure was used in Johnson's plan and recommended to him "by the NAACP." As noted previously Floyd Johnson was not acting on behalf of the NAACP. *See supra* note 7. Although Tilling's urban districts were approved by the Ohio Conference of Branches, neither the 1991 nor the amended 1991 plan were approved by the national office of the NAACP. D. 147, Ex. B at 73-75.

App. H at 174a. Tilling stated that Summit County was "one of the more difficult decisions that we had." D. 123 at 88. He reconfigured Representative Sykes' district to increase black population from 35.4% to 43.3% under the authority of the Voting Rights Act based on his unsupported assumption that "sometime before the middle of the decade it would have been a district that would have been below 30 percent black voting age population" and in order to prevent this "we felt we had to reconfigure it." *Id.* at 89; *see* Chart C.

e. *Representatives McLin and Roberts (Montgomery County—Dayton)*

Athough Tilling admitted that he found no evidence of minority vote dilution in Montgomery County, he reconfigured both Representatives McLin and Roberts' districts acting under the authority of the Voting Rights Act. D. 123 at 108-09. He increased the black population percentage in Representative McLin's district from 42.1% to 54.8% because of what he termed population flow "down the road." *Id.* at 108. "So I think in Montgomery County what we were faced with was not an example of vote dilution but an attempt to try to look down the road and anticipate where population changes might be occurring that could disrupt the existing districts." *Id.*

Tilling reconfigured Representative Roberts' district even though it met the population requirements of the Ohio Constitution. J.A. 206; App. H at 174a. In this instance, however, Roberts' black population was reduced from 36.1% to 32.2% because in Tilling's view "he [Roberts] has shown the ability to get white cross-over voting already." D. 123 at 110. Tilling decreased the black population pursuant to his view of the Voting Rights Act, stating that this decrease "would prevent any vote dilution." *Id.* at 88. Tilling did not explain how the reduction in Roberts' black population percentage was justified in light of the increases in black population percentages of Representatives Mallory, Rankin, Beatty and

Sykes, whose white crossover voting was higher than that of Roberts.[10]

2. *The "Technical Amendments" to the 1991 Plan*

In their initial trial brief (Nov. 29, 1991) Appellants admitted that they deliberately maximized the number of majority-minority districts in the 1991 plan because they believed this was required by federal law. Appellants stated that: (1) they "corrected the minority voter dilution inherent in the Democrats' 1981 apportionment" (D. 36 at 6); (2) they could not "retain the discriminatory [1981] districts" (*id.* at 13); (3) they could not "with impunity, simply ignore minority voting dilution existing in a prior apportionment but must *affirmatively* act to rectify such discrimination *whenever* the opportunity exists" (*id.* at 29); and (4) "[i]ndeed, deliberate construction of minority controlled voting districts is *exactly* what the Voting Rights Act requires." *Id.* Following hearings and oral argument before the trial court on December 3 and December 17, 1991, Appellants reiterated these same points in their post trial brief. D. 137 at 32, 89, 90, 91, 115.

On January 31, 1992, the trial court held that the 1991 plan violated the Voting Rights Act because maximization of the number of majority-minority districts was premised on an incorrect application of federal law. App. A at 7-8a, 14a. The court further held that the totalities data reflected a casual analysis (*id.* at 13a) that was inadequate to support the remedy created in the 1991 plan. *Id.* at 14a. Stating that Voting Rights Act violations cannot be assumed, the court remanded to the Board to give it the opportunity to provide "evidence"

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[10] With respect to the minority representatives in Cuyahoga County, Tilling testified that he found evidence of minority vote dilution because they had populations which were above the threshold permissible by the Voting Rights Act. D. 123 at 93. He made no attempt to explain what the black population percentages were in 1981 and whether they had increased since that time as a result of population migration.

that would legally support the remedy the Board majority created. *Id.* at 11a, 14a. In the alternative, the court provided the Board the opportunity to submit a revised plan; either of these options were to be accomplished by February 19, 1992. *Id.* at 15a.

The Board majority reconvened the Board on February 11 and 18, 1992 to reconsider the 1991 plan. However, at the outset of the February 11 meeting the Board majority's counsel stated that despite the trial court's decision it was their legal opinion that the plan fully complied with the Voting Rights Act's requirement to maximize majority-minority districts.[11]

The Board majority, by a 3-2 vote, adopted Findings and Conclusions consisting of 118 pages prepared by Appellants' counsel. These Findings were not distributed and moved for adoption until shortly before the Board concluded its day long session at 5:00 p.m. on February 18, 1992. D. 147, Ex. C at 76-77. These findings are substantially similar to the Findings and Conclusions Appellants previously submitted to the trial court. App. C at 119a; *compare* D. 133 *with* App. H at 160a.

On February 18, 1992, the Board, after remand, also adopted "technical corrections" to the 1991 plan, which they claimed resulted primarily from combining split political boundaries. D. 147, Ex. C at 84-86. With the exception of the increase in black population in Representative Roberts' district, the black population in each of the urban districts was decreased. *See* Chart C. These changes again were made under the authority of the Voting Rights Act. For example, Tilling noted that in Franklin County, 1981 District 31, Representative Beatty received 50.3% white crossover voting while Representa-

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[11] D. 147, Ex. B at 13. "We believe that it is firmly established by a growing volume of legal precedent that a single member district plan which does not create, where reasonably feasible, districts in which a minority group constitutes a majority violates Section 2 of The Voting Rights Act because it impermissibly dilutes or fractures the Voting strength of the minority." *Id.* at 11-12 (Victor Goodman).

tive Miller received "only" 44.5%. *See* Chart C. Tilling then stated "[a]nd *in my view* certainly, and I would ask the Board to consider this, *I believe* that is a very significant finding of racially polarized black voting." J.A. 288 (quoting D. 147, Ex. C at 60) (emphasis added). The trial court concluded that the additional "meager information" submitted by the Board and the technical amendments were inadequate to salvage the 1991 plan from violating the Voting Rights Act. App. C at 119a.

SUMMARY OF ARGUMENT

1. The record demonstrated that there was no legally significant racial bloc voting for legislative races in Ohio, that black voters had been able to elect black and white representatives of choice over a sustained period of time, and that under the 1981 boundaries drawn pursuant to Article XI of the Ohio Constitution black voters had achieved greater than proportional representation in the state legislature. Nevertheless, Appellants reconfigured districts historically electing blacks with as little as 35% black population to "maximize" minority districts, both as a "right" and a "remedy." The device they chose to "maximize" was to pack black voters into majority-minority districts where their votes would be wasted and to fragment them into districts where their votes would be rendered ineffective. Appellants adopted this device allegedly to correct "inherent discrimination" in the pre-existing districts. The trial court properly held, however, that the record Appellants proffered to justify the "inherent discrimination" conclusion was "grossly inadequate."

2. Appellees charged that Appellants misused the Voting Rights Act on a statewide basis as a device to dilute minority voting strength and that Appellants racially gerrymandered nine specific districts where blacks previously had been electing representatives of choice in violation of Section 2 of the Act. The trial court properly found that Appellants' plans packed and fragmented black voters, that there was effective coalitional voting between

blacks and whites in Ohio, and that Appellants' plans targeted the destruction of this coalitional voting.

3. Appellants insisted upon applying a Section 5 remedy to Ohio, a non-Section 5 state, but denied any obligation to show a factual basis for their legal conclusion that majority-minority districts must be maximized or that black candidates (incumbents and non-incumbents) must be guaranteed safe black seats.

4. Appellants have retreated from their legal positions before the trial court. They erroneously claim that the court "mischaracterized" their per se arguments and shifted the burden of proof to them to examine the totalities of circumstances criteria under the Act. In fact, the court did not mischaracterize their arguments or shift the burden of proof; Appellants themselves introduced the per se approach and defended their actions on the basis of the "totalities" criteria, but failed to persuade the court of the merits of that defense.

5. By entering into a stipulation to dismiss the January 31, 1992 Opinion and Order of the trial court, Appellants have abandoned any appeal of the decisions or requirements of that order, including their argument that the trial court shifted the burden of proof to them.

6. Appellants' argument that the trial court should defer to their application of "state policy" suggests that they have some reservoir of "policy" that they are free to adopt aside from the Ohio Constitution. In fact, all of Ohio's state "policy" on apportionment is set forth in the Ohio Constitution. From the outset, Appellants' consistent purpose has been to avoid the anti-gerrymandering provisions of the Ohio Constitution by insisting that the Voting Rights Act overrides these provisions.

7. In the trial court's orders of March 10, 1992, and March 19, 1992, the trial court made ample findings to support its conclusion that the plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

ARGUMENT

I. APPELLANTS SOUGHT TO "REMEDY" UNPROVEN VIOLATIONS BY IMPERMISSIBLY PACKING AND FRAGMENTING MINORITY VOTERS

A. The Court Did Not "Mischaracterize" the Appellants' Position

From the outset of the apportionment process Appellants missed no opportunity to pack black voters and dilute their voting strength. Their device for doing this was the adoption of a policy to maximize majority-minority districts. While their stated justification for these packed districts has varied with Appellants' fortunes in the court, the purposeful intent has remained steadfast. At the public hearings held throughout the state, Tilling, as agent and spokesman for the Board majority, proclaimed that majority-minority districts were required as a matter of law. Tilling's legal justifications before the public were mirrored by Appellants' counsel's repeated legal arguments urging the trial court to conclude that "deliberate construction of minority controlled voting districts is *exactly* what the Voting Rights Act requires." D. 36 at 29.

Reacting to the attack of the Appellees and the finding of the court below, Appellants are now in full retreat from their previous arguments. In their Brief to this Court they argue that the trial court manufactured a legal position that it attributed to them. They contend that the trial court's reference to their "actions as deliberately creating minority controlled districts 'wherever possible' . . . [was] a mischaracterization of the process" that they followed. Appellants' Brief at 24. The excerpts from Tilling's public statements, his deposition and the arguments of Appellants' lawyers in their trial briefs, during trial and to the Board on remand, demonstrate that there was no "mischaracterization" by the trial court of Appellants' legal position. Their legal position was consistent and unambiguous: majority-minority districts

had to be created wherever possible.[12] As the trial court accurately stated, it "addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts whereever possible." App. D at 131a.

B. No Per Se Approach Is Mandated Under Federal Law

The trial court rejected the argument that majority-minority districts were required under cases interpreting the Voting Rights Act or the Act itself. App. A at 8a. The court noted that Appellants did not cite and could not cite a single case standing for the proposition that Section 2 requires the per se maximization of majority-minority districts, in the absence of a proven violation. App. D at 140a.

The consistent theme of the Senate Report, of this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and other case law interpreting Section 2, is that the question of whether a violation exists is not resolved by resort to per se remedies but is intensely fact-driven. "[T]he question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" S. Rep. No. 417, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S.C.C.A.N. 177, 208 (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)). As this Court concluded in *Gingles*, "this list of typical factors is neither comprehensive nor exclusive" and " 'there is no requirement that any particular number of factors be proved, or that a major-

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[12] Appellants argued to the trial court that they must "maximize" minority voting strength pursuant to the Voting Rights Act:

> "Where opportunities exist, the State must *maximize* minority voting strength. Thus, it may be a violation of Section 2 for a state to fail to create a district in which minorities are the majority if such a district can be created. Even if not a 'right,' maximization of minority voting strength may clearly be a remedy."

D. 36 at 32 (citation omitted); *see supra* note 13; D. 48 at 58-59; D. 137 at 89-90.

ity of them point one way or the other.'" 478 U.S. at 45 (quoting S. Rep. at 29, 1982 U.S.C.C.A.N. at 207).

Appellants had a predetermined remedy searching for an elusive and unprovable violation. Because there was no violation to be found, Appellants repeatedly have insisted upon applying a per se remedy to Ohio as if it were a Section 5 state. However, no areas of Ohio have ever been subject to the purview of Section 5. For Section 5 jurisdictions, Congress has already made a "careful review of the contemporaneous record of on-going voting rights discrimination" in the areas affected. S. Rep. at 9, 1982 U.S.C.C.A.N. at 186. Accordingly, a Section 5 state may either set out to maximize majority-minority districts or be judicially required to do so without making the "searching practical evaluation" this Court most recently found in *Gingles* under Section 2 of the Act.[13] "The Voting Rights Act authorizes and in some instances compels racial gerrymandering in favor of blacks and other minorities." *Prosser v. Elections Bd.*, No. 92-C-0078-C, 1992 U.S. Dist. LEXIS 8103 at *28 (W.D. Wis. June 2, 1992) (per curiam). Indeed, the Act authorizes and may compel the creation of majority-minority districts where Section 5 is at issue or if it is necessary to remedy proven violations of Section 2.

Even though Section 2 employs a "results" test, the burden is upon those asserting a violation of the Voting Rights Act to provide evidence, establish the violation and justify imposition of a remedy. If a Section 2 violation is established, an appropriate remedy *may* include maximizing the number of majority-minority districts, but

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[13] In *United Jewish Organizations v. Carey*, 430 U.S. 144, 159 (1977), which was mis-cited by Appellants to support their position (Appellants' Brief at 27), the redistricted area of New York at issue was subject to Section 5 and the creation of majority-minority districts was a Section 5 remedy implemented in order to avoid retrogression of the minorities' right to vote. Appellants also mis-cite *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 681 (1991) (Appellants' Brief at 27), which the trial court has already distinguished on well-reasoned grounds. App. D at 138a.

neither the language of the Voting Rights Act nor the decisions of this Court require such a remedy in all circumstances. The Senate Report stated that the nature of the Section 2 remedy will depend upon a factual determination of the totality of circumstances.

> "The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances."

S. Rep. at 31, 1982 U.S.C.C.A.N. at 208.

Given the remarkable similarity in language and approach, the genesis of Appellants' confusing misuse of the Voting Rights Act, *i.e.* the per se maximization of majority-minority districts in Ohio, appears to be an article written by Lee Atwater, former Republican Party Chairman, which states:

> "First, the [*Gingles*] Court implies that, under the Voting Rights Act where minority districts *can* be created they *must* be created . . . . This state of the law under Section 2 and Section 5 has two significant nationwide implications for the 1990s redistricting cycle. First, where minority districts currently exist, they must be maintained (though not necessarily in the same configurations). Second, where minority districts can be created, they must be created."

L. Atwater, *Altered States: Redistricting Law & Politics in the 1990s*, 6 J.L. & Pol. 660, 668 (1990).

However, both *Gingles* and the Senate Report make it clear that the Atwater approach of treating Section 2 and Section 5 interchangeably is not the process contemplated under the Act. In *Gingles*, Justice O'Connor made it clear that there is no magic in a 50% majority figure:

> "[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the

> extent of past discrimination against minority voters in a particular State or political subdivision."

478 U.S. at 94-95 (O'Connor, J., concurring). The only language contained in the Act addressing the degree of representation states, "[n]othing in this section establishes a right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). As the Senate Report states, this provision "put[s] to rest any concerns that have been voiced about racial quotas." S. Rep. at 31, 1982 U.S.C.C.A.N. at 208. Given Congress' express statement that the Act does not require proportional representation, it follows that Congress did not intend to require maximizing majority-minority districts as either a "right" or a "remedy," absent proof of vote dilution.

II. APPELLANTS SEEK UNFETTERED DISCRETION IN LIEU OF A SEARCHING PRACTICAL EVALUATION WHEN DETERMINING THE EXISTENCE OF PURPORTED VOTE DILUTION

The "mischaracterization" and "shifting burden of proof" arguments now advanced by Appellants are an attempt to distance themselves from the unambiguous posture they previously took in the trial court. This retreat is an understandable exercise in hindsight, since by initially invoking alleged violations of the Act as the excuse for their per se "remedy" Appellants cannot logically avoid an obligation to present totalities evidence nor avoid the trial court's finding that their submission was "grossly inadequate." App. A at 11a. Moreover, if there is no Section 2 violation shown by those who argue its existence, then maximization of majority-minority districts is neither required, nor necessarily permissible in Ohio.

Following remand on January 31, 1992, Appellants, in apparent recognition that their totalities analysis initially submitted to the court was seriously deficient, for the first time argued that they should be exempt from the necessity of submitting any totalities analysis and that

the trial court had shifted the burden of proof. They made this argument in spite of the fact that twice they submitted to the trial court documents labelled as "totalities of the circumstances" evidence which they argued conclusively proved vote dilution. To further distance themselves from the factual vacuum of their record, Appellants also argue that the court should have deferred to their "policies and preferences." Appellants' Brief at 23. The three arguments Appellants advance here, the "exemption" from a "totalities" analysis argument, the "shifting burden of proof" argument, and the "state policy" argument all amount to the same thing: Appellants seek the unreviewable discretion to apply Voting Rights Act provisions, intended to shield minorities from unlawful discrimination, as a sword against the voting strength of blacks, their political opponents, with no obligation to provide either credible factual or legal support for their decisions or behavior.

A. Appellants Waived the "Burden" Issue

Appellants' primary argument is that the trial court shifted the burden of proof by requiring them to show a past violation of Section 2 of the Voting Rights Act. Appellants' Brief at 22. The shifting burden of proof argument derives from the trial court's January 31, 1992 Opinion and Order where the court stated that "[u]nless it [the Board] can show justification under the totality of the circumstances test for the present configuration the Board must submit a revised plan to this court within 20 days of this order." App. A at 14-15a.

Instead of appealing the January 31 Order, Appellants undertook to develop a "totalities" justification for the present configuration, in form only. Thus, they reconvened the Board on February 11 and February 18, 1992, received substantially the same evidence that had been presented to the court, and resubmitted their plan to the court with "technical corrections" on February 19, 1992. After the time to appeal the January 31 order expired, Appellants included that order among the orders on appeal to this Court in their March 11, 1992, notice of appeal. App. E at 149a.

Appellees moved to dismiss the Appellants' appeal of the January 31, 1992 Order as untimely filed. In response to that motion, Appellants entered into a stipulation that states, "[p]ursuant to Supreme Court Rule 18.5 Plaintiffs and Defendants hereby stipulate that the portion of the appeal to the United States Supreme Court from the January 31, 1992 Order of the District Court shall be dismissed. The stipulation does not affect the appeal from [the] March 10, 1992 Order." App. F at 153a. Consequently, Appellants abandoned any appeal of the decisions reached by the trial court in the January 31 Opinion and Order.

The March 10, 1992 Order did not purport to shift any burden to Appellants, thus their argument concerning the shifting of burden must be based upon the January 31 Order. However, even assuming *arguendo*, that the trial court placed such a burden on Appellants, that issue is not properly before this Court as a result of Appellants' voluntary stipulation. Where Appellants have failed to properly seek review, this Court has consistently refused to address issues improperly before it. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 421 n.12 (1972).[11] Accordingly, this Court should not reach the question presented by Appellants regarding the alleged shifting of the burden of proof.

B. Having Voluntarily Placed the "Totality of Circumstances" in Issue Appellants Are Now Estopped from Challenging the Trial Court's Use of This Standard

Contrary to the Appellants' assertion the trial court neither relieved Appellees of their burden of proving their declaratory judgment case nor the burden of proving minority vote dilution in the nine districts where specific violations of the Voting Rights Act were alleged. Long

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[11] *Accord: Dellmuth v. Muth*, 491 U.S. 223, 232 n.3 (1989); *Alexander v. United States Dept. of Housing & Urban Dev.*, 441 U.S. 39, 45 n.5 (1979); *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 16 n.8 (1979); *United States v. Stapf*, 375 U.S. 118, 122 n.7 (1963).

before this case was filed Appellants voluntarily and publicly shouldered the burden of justifying the majority-minority districts which they sought to maximize under a totalities of circumstances analysis. *See supra* pp. 5, 13.

Appellants' counsel, not the trial court, placed the Appellants' "totalities" analysis in issue. Before any ruling by the trial court, Appellants in their pretrial and post-trial briefs proffered evidence relating to the seven "totalities" criteria set forth in the Senate Report to show that their majority-minority districts were justified under the Act. D. 36 at 33-36; D. 137 at 37-52. In their pretrial brief Appellants summarized their argument as follows: "In short, the 'totality of circumstances' strongly support rectifying the inherent discrimination in the 1981 apportionment. Defendants have done so." D. 36 at 36. Contrary to Appellants' arguments concerning an alleged shifting of burden, the court simply recognized the obvious flaw in Appellants' defensive posture: by not following the "process" of examining relevants facts, Appellants left themselves open to the resulting "pitfalls" that arose as a result, including a valid fact-based finding of vote dilution. App. A at 16a.

The trial court also specifically denied that it forbade Appellants either from anticipating a Voting Rights Act challenge or attempting to remedy potential violations *before* analyzing the totality of the circumstances. Rather, the court accurately stated that it responded to Appellants' assertion that federal law required them to aggregate black population in districts to remedy the vote dilution evidenced in their totalities analysis. App. A at 11a, 14a. By insisting at trial that they had conducted a full "totalities" examination of the relevant evidence, Appellants forced the trial court to address the issue and rule on the sufficiency of their totalities analysis.

C. The Trial Court Was Justified Fully in Finding Appellants' "Totalities" Analysis "Grossly Inadequate"

In support of its finding that the Appellants' totalities analysis was "grossly inadequate," the court noted that

Tilling arrived at his conclusion that there was significant racial bloc voting without the benefit of any objective and credible evidence, including regression analysis. App. A at 12a. The court concluded that Tilling's analysis did not "rise to the level of proof of racially polarized voting" or of the other totalities factors because, among other things: (1) he failed to subject the data to any statistical analysis; (2) he relied upon his unwritten casual analysis of voting returns as evidence of racial bloc voting; (3) he was unable to give an unequivocal response to the issue of whether racial bloc voting was legally significant in the districts at issue; (4) he failed to analyze the voting records of representatives; and (5) much of the public hearing information was anecdotal and culled from Tilling's personal experience. App. A at 12-13a. The Court thus concluded that the Board's "totalities" assessment fell "far short of the 'searching practical evalution of past and present reality' mandated by the legislative history," as required by this Court's decision in *Gingles*. App. A at 14a; *see supra*, pp. 4-6.

The Board's second "totalities" submission after remand contained only "meager information that was not previously before this Court." App. C at 119a. The well-established legal principle that remedies must be commensurate with the violation [15] leads to questions about what "new" totalities evidence the Appellants found after remand to justify their quota or proportional representation remedy. The trial court found that the Board's "new" socioeconomic evidence, merely consisting of seven exhibits 101-107 not previously submitted, "fail[ed] to connect the socioeconomic statistics presented to any proven inability of black voters either to elect or affect the election of candidates of their choice . . . . No such proof was even proffered by the Board." App. D at 134a.

The trial court also found that the totality of circumstances showed coalitional voting between whites and

[15] *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) ("The remedial powers of an equity court must be adequate to the task, but they are not unlimited.").

blacks, that the Voting Rights Act was not designed to prevent coalitional voting and that accordingly a central issue in the case was "whether the Board should be permitted to destroy what is right in Ohio— . . . coalitional voting." *Id.* at 132-34a. Appellants' only comment below about coalitional voting was their straightforward complaint that it operated to elect their political enemies.[16]

The core of the court's concerns about the Board's totalities analysis was the Board's decision to ignore three critical facts: (1) "the absence of racial bloc voting;" (2) the ability of black voters "to elect both black and white candidates of their choice;" and (3) the election of candidates of choice "over a sustained period of time." App. D at 130a. Appellants never proffered any evidence to support even an inference that these circumstances had changed or were likely to change in the future. Instead, they asked the trial court to ignore the history of the ballot box in Ohio showing the compelling fact that minority candidates of choice repeatedly had been elected from districts with black populations with as little as 35%. J.A. 308. This single fact belies their argument that they were entitled to override the Ohio Constitution and thus misapply the Voting Rights Act. They judicially admitted this fact in their Answer to Appellees' complaint:

> "Defendants admit the allegations contained in Paragraph 33 of Plaintiffs' Complaint that in Ohio under the Democrats' 1981 apportionment, African-American legislators have been elected in areas with minority populations as low as thirty-five percent (35%), that the Ohio House of Representatives had eleven (11) minority members, that only four (4) of those minority members are elected from a minority-majority district and that there is a large white crossover

[16] Tilling remarked at the February 18, 1992 Board hearing that he has "rarely seen a well-heeled Republican House candidate running in a minority district," recognizing that in every district where blacks form at least 13% of the population Democrats are elected. D. 147, Ex. C at 64-66.

> vote in many parts of Ohio to elect minorities to state legislative office."

J.A. 2, D. 15, ¶ 11 at 5-6. Appellants have continued to ignore the legal implications of their admissions. The specific language of the Voting Rights Act singles out the election of minorities for special emphasis, stating that "[t]he extent to which members of a protected class have been elected to office in the State . . . is one circumstance which may be considered . . . ." in determining whether members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).[17]

Appellants also ignore the court's findings that based on the record the plan abridges the right to vote of black voters by packing and fragmenting. Appellant's answer, along with the previously cited excerpts from Appellants' trial briefs provided an ample record upon which the court could have rendered judgment in favor of Appellees on their declaratory judgment claim regarding misuse of the Voting Rights Act. In their complaint, Appellees asked the court to enter a declaratory judgment that: (1) the Voting Rights Act did not prescribe maximizing majority-minority districts in the absence of the type-sensitive totalities evaluation articulated in the legislation and by *Gingles*; (2) the Appellants improperly used the Voting Rights Act to ignore Ohio consitutional requirements; and (3) Appellants impermissibly diluted minority voting strength by packing, fragmenting and segregating minority voters in nine districts. J.A. 2, D. 1 at 22. The trial court made each of those findings. App. A at 7-8a, 14a, 16a; App. D at 130a, 132-34a, 141-44a, 146a.

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[17] In *Gingles*, this Court reversed the trial court because it had ignored the continuous success of black voters in one of North Carolina's multimember districts. 478 U.S. at 77. That success resulted in proportional representation inconsistent with the plaintiff's allegation that the ability of black voters in that district was unequal to that of white voters in electing representatives of their choice.

D. Rather Than Follow State Policy Appellants Avoided It

The entirety of Ohio's "policy" regarding apportionment is set forth in Article XI of the Ohio Constitution, which is silent on issues of race but is clearly designed to avoid partisan gerrymandering.[18] The Board's discretion in drawing districts under the Ohio Constitution is deliberately limited. Consequently, Appellants were driven to rely exclusively on the Voting Rights Act in order to justify their determination to effect partisan gerrymandering by purportedly maximizing majority-minority districts. Appellants are not entitled to use the Voting Rights Act to override the Ohio Constitution in order to achieve a predetermined purpose of diluting the political power of black voters. *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (rejecting a state's unrestricted and unlimited power to apply state policy). Nowhere have the Appellants articulated what "state policy" they followed. The only "policy" that they rely upon is a distorted reading of the Voting Rights Act which Appellants

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[18] Section 7(D) of Article XI of the Ohio Constitution requires the maintenance of existing districts to the extent possible given population changes in the decennial period to prevent gerrymandering by whichever political party holds a majority of the apportionment board. *See State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 509 (1942):

> "The objective sought by the constitutional provisions was the prevention of gerrymandering. By . . . adopting self-acting provisions, it was sought to place the function of apportionment in impartial hands and at the same time mark the way so that in the main at least the provisions of the Constitution would work automatically and the apportioning process ordinarily be a mere matter of calculation. *If the proper construction were that the districts fall apart at the end of each decennium, an entirely new adjustment would be necessary and the way for gerrymandering opened up.*"

(Emphasis added). Although Article XI was repealed in 1967, as a result of *Nolan v. Rhodes*, 378 U.S. 556 (1964), *rev'g*, 218 F. Supp. 953 (S.D. Ohio 1963), the new sections of Article XI corrected the unconstitutional infirmities but maintained the fundamental tenets in *Bricker*. *See*, Ohio Const. art. XI (Former Constitutional Provisions).

invoke to override the anti-gerrymandering restrictions of the Ohio Constitution.

Appellants admittedly drew their plan of apportionment to *avoid* the Ohio Constitution. The record is clear —Tilling asserted and testified unequivocally that federal voting rights law required the Board to maximize majority-minority districts at the expense of the Ohio Constitution. "What we have to do next, *not because of the constitution of the State* but because of the U.S. Supreme Court's decisions, is draw minority districts in our urban areas." D. 154, Cleveland Hearing 8/28/92, at 8 (emphasis added). The trial court properly found that "[t]he Board did not purport to devise this rule based on Ohio policy and law; rather, it contended that such a per se [majority-minority] rule is mandated by federal law." App. D at 131a.

In this Court, Appellants plead for deference to their discretion. However, after Congress revised the Act in 1982, a court confronted with a voting rights claim could no longer look at the subjective intent of the decisionmakers. The 1982 amendments made clear the Congressional determination that violations were to be judged by their *effect*, regardless of the underlying *intent* of the state actors. Specifically, the trial court below was required to conduct an objective inquiry analyzing the totality of circumstances. S. Rep. at 28-29, 1982 U.S.C.C.A.N. at 206-07.

For a court to examine the totality of circumstances there must be an adequate factual record to examine. Appellants wished to have it both ways, to cover their bets by submitting "totalities" evidence and at the same time insisting that the trial court required them to do so. They would use the Act as a sword to carve boundary lines diluting black voting strength and as a shield to defend that behavior from scrutiny claiming an exemption from "totalities" analysis and seeking deference to "state policy." The legislative history of the 1982 amendments nowhere suggests that Congress intended to bestow upon the states the discretionary power to apply the Voting

Rights Act against black voters who are political enemies, under the gloss of "state policy."

Even assuming, *arguendo*, that Appellants political purpose of packing black voters was devoid of racial animus and consisted of nothing more than a desire to gain partisan advantage by politically gerrymandering black voters, this is nevertheless an impermissible use of the Act. The Voting Rights Act is a statute exclusively concerned with the protection of minorities; it is not some "all-purpose weapon" [19] for politicians to wield against their enemies.

1. *The Ohio Supreme Court Decision Reached Only the Narrow Issue Raised By a Friendly Counterclaim*

On February 14, 1992, the Ohio Supreme Court issued a sharply divided 4-3 per curiam deicsion in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992), before the Board issued its "technical amendments" on February 18, 1992. The court found "against the *counterclaimants* on their claim that the plan is unconstitutional and, *accordingly*, we find the plan to be constitutional." *Id.* at 200. The counterclaimants were Republican State Senators Henry and Drake, cooperative and friendly to the Appellants, who filed to provide the Appellants with an argument that the state court had jurisdiction to issue an advisory opinion. The only issue raised in the friendly counterclaim was whether Ohio Senate District 32 could be deemed to meet the state constitutional requirements, notwithstanding the fact it failed to meet the population requirements of Section 4 of Article XI. *Id.* All of the Ohio Justices found that the only justiciable issue decided in the dispute before them was the state constitutionality of the populations of Senate District 32 and House District 68. *Id.* at 202, 212, 214-25.[20]

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[19] *Chisom v. Roemer*, —— U.S. ——, 111 S. Ct. 2354, 2369 (1991) (Scalia, J. dissenting).

[20] Chief Justice Moyer said, "[t]here is no other justiciable issue or controversy before us upon which to issue a declaratory judg-

The issue not reached by the Ohio Supreme Court was Appellants argument that they were prevented from following the Ohio Constitution by the requirements of the Voting Rights Act.[21]

III. THE TRIAL COURT PROPERLY REJECTED APPELLANTS' PROPORTIONAL REPRESENTATION STRATEGY

In their brief on remand of February 18, 1992, Appellants adhered to their original views that: (1) the Voting Rights Act must be applied to Ohio; (2) "[w]here opportunities exist, the State, in reapportioning, must configure minority controlled districts;" and (3) they had met all of the "totalities" factors. D. 161 at 83.

To these assertions, they added the argument that the districts of elected black legislators must be reconfigured to guarantee the election of a black candidate, including non-incumbent black candidates in the districts at issue. "The Board concluded that while there is a white [sic] crossover voting in the minority districts . . . *there is insufficient black population in the minority districts to guarantee the election of a black candidate* particularly given levels of voter turnout and racial bloc voting in the district." D. 161 at 55 (emphasis added). *Accord*: App. D at 207a.

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ment." 63 Ohio St. 3d at 202. The basis of the dissents of Justices Resnick, Holmes and Sweeney was that the court *failed* to reach the merits of the constitutional claims presented by the Appellants, who were also plaintiffs in *Voinovich*.

[21] "First, plaintiffs argue that required compliance with the federal Voting Rights Act of 1965, Section 1973 *et seq.*, Title 42, U.S. Code, prevented them from retaining some prior districts by requiring them to create as many districts as possible where black voters could be in the majority. However, the January 31, 1992 order of the federal three-judge panel in *Quilter v. Voinovich*, concluded that there was no such legal mandate under the Voting Rights Act, and specifically removed this claim as a possible defense in state proceedings. Therefore, no weight can be accorded to plaintiffs' evidence or argument on this claim." *Voinovich v. Ferguson*, 63 Ohio St. 3d at 224 (Resnick, J., dissenting) (citation omitted).

Without providing a scintilla of evidence, Appellants' "guaranteed safe seats" thesis made several assumptions about the relationship between race and voting in Ohio legislative elections that: (1) the substantial historic white crossover vote will only be available to incumbents; (2) black voters would never consider a white candidate to be their representative of choice; (3) all of the black incumbents are likely to resign or die in the next ten years; and (4) race is the dominant political issue for Ohio voters.

Taking these assumptions to be fact, Dr. King, Appellants' expert, testified that he calculated a rough "incumbency" factor which called for adding from 6-10% black population. J.A. 261.[22] The ostensible purpose of this "incumbency" factor was to guarantee the election of a black candidate even if the incumbent decided not to continue serving the district. D. 147 at 58. King estimated that based on 1990 election results, incumbent black legislators would continue to win by pluralities from 76-89%, and that non-incumbent black candidates would win by pluralities from 69-81%. D. 153, Ex. 112; J.A. 258-59. Dr. King admitted that this approach might appear "at first glance to be packing." J.A. 259.

An analysis of these assumptions and projections makes clear that Appellants set out to guarantee a certain quota of black legislators, as though there were a black entitlement to a certain proportional representation in the state legislature. However, as the trial court noted and found, Ohio's legislative electoral history makes it clear that the Appellants had set out to fix something which most demonstrably was not broken. App. D at 132a.

The record established that Democratic legislators have been more sensitive to issues of concern to black

[22] King testified that the incumbency factor is "something less than around 10%." J.A. 259. Later he said it was "between roughly six and roughly ten percent." J.A. 261. When asked what the incumbency factor was for Representative Mallory he was unable to give a definitive answer to the question. J.A. 261-62.

voters than Republican legislators. For this reason, black voters in Ohio have tended to vote overwhelmingly for Democratic candidates, whether those candidates be black or white. Undisputed evidence established that legislative districts with 13% or more black population tended to elect Democratic legislators, that districts which had 35% or more black population tended to elect black legislators, and that every black incumbent legislator was Democratic.

Rather than calling upon Republican legislators to show greater sensitivity upon issues of concern to black voters, the Appellants sought to neutralize the impact of the coalition which had been established between black voters and white Democrats. One method chosen was to cram as many black voters as possible into those districts where blacks already controlled the election. A second method was to cram Democratic voters as greatly as possible into those districts likely to be controlled or greatly influenced by Democratic voters. The third method was to purge suburban districts to the greatest extent possible of black population and voters. It was not coincidental that a policy of "maximizing" the number of majority-minority districts combined elements of all three of these strategies.

The biggest obstacle to the Appellants' policy and strategy were the anti-gerrymandering provisions of the Ohio Constitution, particularly those provisions which required maintenance of those districts which otherwise met the population standards set forth by the Constitution's language. App. I at 282a (§ 7(D)). Since no provisions of either Ohio law or judicial precedent permitted pursuit of this partisan strategy, the Appellants seized upon a deliberately distorted interpretation of the federal Voting Rights Act as the vehicle most likely capable of transporting their partisan strategy across the Ohio Constitutional impediments.

Appellees challenged the permissibility of such a cynical manipulation of federal voting rights laws designed to protect minority voters. This manipulation led to: (1) wast-

ing black votes by needlessly packing blacks into districts already controlled by black voters; and (2) compromising black political effectiveness by guaranteeing that black voters not crammed into packed districts were sufficiently fragmented and dispersed to keep the black population below the 10% threshold wherever possible. *See* Charts A & B.[23] As a result of Appellants' race-based partisan gerrymandering strategy, their plan reduced the number of influence districts with 10-50% black population from twenty-three to eleven and increased the number of districts with less than 10% black population from twenty-two to thirty-one. J.A. 198-99.

Appellants' partisan gerrymander strategy required that they assert an obligation to "maximize" the number of minority districts, and this obligation led to implementation of a proportional representation policy, one in which a certain minimum number of districts would be guaranteed "safe" for the election of minority candidates. Both the proportional representation pursued and the quota of "safe" seats created are inconsistent with the clear intent of Congress[24] and the opinions of this Court interpreting the Act.[25]

The trial court took note of the fact that the absence of legally significant racial bloc voting combined in Ohio

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[23] Charts A & B show that blacks were packed into five districts (21, 22, 30, 31, 49) and fragmented into fifteen districts (23-29, 32-34, 36-37, 50-52) when previously these black voters were electing black representatives with very substantial white crossover vote and white representatives iwth voting records of 90-100% on issues of concern to black voters.

[24] "[N]othing in Section 2 establishes a right to have members of a protected class in numbers equal to their proportion of the population" 42 U.S.C. § 1973(b).

[25] "Under the results test, the cases never required proportional representation and invariably repudiated it." S. Rep. at 33, 1982 U.S.C.C.A.N. at 210; *see, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977); *White v. Regester*, 412 U.S. 755, 767 (1973); *Whitecomb v. Chavis*, 403 U.S. 124, 149-50 (1971).

with strong black-white coalitional voting patterns to elect sufficient black legislators to equal or exceed the number that would have been produced had proportional representation been legally permissible. Thus, the record established and the court below found, Appellants employed tactics which not only failed to *advance* minority voting rights, but which actually attempted to *destroy* the coalitional voting which had succeeded in enhancing black political participation and influence in Ohio legislative elections. This led the trial court to quote the text of the Voting Rights Act that explicitly rejects proportional representation. App. D at 142a (quoting 42 U.S.C. § 1973(b)).

IV. APPELLANTS' ADMITTED RACE-BASED MANIPULATION OF DISTRICTS WHICH DILUTED MINORITY VOTING STRENGHTH FOR REPUBLICAN POLITICAL ADVANTAGE VIOLATES THE FIFTEENTH AMENDMENT

When a state "singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). Racial gerrymandering is a form of racial discrimination violative of the Fifteenth Amendment. *Id.* at 342. When state action, such as a plan of apportionment, is "motivated by a discriminatory purpose," the Fifteenth Amendment is violated. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). A discriminatory purpose is proved where the plaintiffs can show that the state plan of apportionment was "motivated by racial considerations or in fact drew the districts on racial lines," to discriminate against a minority population. *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964). *Accord: Bolden*, 446 U.S. at 63. Indeed, as this Court stated, absent a compelling reason, "government has no business designing electoral districts along racial or religious lines." *Wright*, 376 U.S. at 64 (Douglas, J., dissenting).

Here, Appellants repeatedly admitted and publicly proclaimed that their plan of apportionment *was motivated* by racial considerations. App. D at 142a n.8;

J.A. 13-14, 16, 279-83; D. 48 at 81-82. They admittedly set aside the Ohio constitutional requirements in order to maximize majority-minority districts. App. D at 142a n.8; J.A. 13-14. The uncontroverted results of their plan was to abridge the opportunities of minorities to participate in the political process and elect candidates of their choice (App. D at 141a n.6) for Republican political advantage. *Id.* at 143a & n.9. Appellants, therefore, motivated by a discriminatory purpose properly were found by the trial court to have violated the Fifteenth Amendment in drafting both the 1991 plan and its technical amendments. *Bolden*, 446 U.S. at 62.

Having found that: (1) the Board admitted race-conscious drawing of districts (App. D at 131a); (2) its plan resulted in dilution of minority voting strength (*id.* at 141-42a); and (3) the Board understood and had documents mapping out how Republicans could gain political advantage by "packing" blacks (*id.* at 143a n.9), the trial court properly concluded the Fifteenth Amendment had been violated. Fifteenth Amendment cases are intensely fact specific, and although the sufficiency of proof varies, *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 681 (1991), the trial record here is replete with evidence from which the trial court could and did find that the Board's plan violated the Fifteenth Amendment. *See supra*, pp. 2-15.[26]

A. Appellants Consciously Manipulated Populations With Apparent Indifference to the Effect on Black Voting Strength

Appellants acknowledged that minority districts with less than a majority of the population (as low as 35%) are currently represented by the minority's candidate of choice. J.A. 24. Notwithstanding this knowledge, Ap-

[26] This Court has held it will not overturn a trial court's findings of fact, including a finding of intentional discrimination, unless clearly erroneous. *Rogers v. Lodge*, 458 U.S. 613, 623-24, 627 (1982); *see White v. Regester*, 412 U.S. 755, 767-70 (1973).

pellants admit they purposely added unnecessary black population to those districts. Despite Appellants' claim that their racial motivations were pure, they canont negate the voluminous record which led the trial court to conclude that Appellants intentionally discriminated against minority voters in Ohio—"the Board cannot seriously contend that it did not supply its 'remedy' intentionally and for political advantage in violation of the Fifteenth Amendment." App. D at 142-43a (footnotes omitted). The trial court properly concluded that Appellants' use of the Voting Rights Act to dismantle Article XI of the Ohio Constitution was a pretext for their racial gerrymander.

Appellants deliberately misstate the record below when they argue that the trial court did not make any findings concerning their intent to discriminate. The trial court stated that its task in evaluating Appellants' alleged Voting Rights Act violation was not as difficult as it may seem because,

> "[t]he totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population. Against this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes—*exactly what the defendants intended.*"

App. D at 141-42a (emphasis added; footnotes omitted).

The very existence of the frequent statewide majority or near majority white crossover vote for black candidates requires the plan drawer to take particular care to avoid unnecessarily packing or avoidably diluting minority voting strength. App. D at 141a n.6. Moreover, the size of the white crossover vote provides a measure to "assess what the dividing line is between packing and not packing minority voting strength." *Id.*; J.A. 147. Appellants did not make a reasoned effort to determine what that dividing line was. Instead, they simply ignored the statistics which show coalitional voting and the absence of legally significant racial bloc voting. Elections where

a majority or near majority of whites voted for black candidates, along with a majority of blacks, is the exact opposite of racially polarized voting. Bernard Grofman et al., *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 Law & Pol'y 199, 207 (1985).

Appellants admitted their policy was to maximize "guaranteed" or "safe" seats for black candidates, and made no showing that any of the districts which they gerrymandered were unsafe—that there was any probability that either an incumbent or successor preferred by blacks would be unable to be elected because of hostile white bloc voting. They made rough guesses about the value of incumbency but failed to demonstrate that those assumptions applied to the election or defeat of a single minority candidate. D. 123 at 87, 89, 90, 102-10; *see* J.A. 308. Tilling did not compare the 1980 and 1990 population figures to determine if in fact there was any "inherent discrimination" in the 1981 districts as a result of applying the provisions of the Ohio Constitution in the prior apportionment. App. A at 12a. Although Tilling was fully aware of the uses of regression analysis and the *Gingles* discussion of racial bloc voting, neither he nor his staff performed any regression analysis, purportedly because he ran out of time. J.A. 12, 32, 34. Moreover, Tilling knew when he drew the plan that 85-95% of the time blacks voted heavily Democratic. J.A. 15.[27]

When racial motives[28] and political motives are mixed, even where race is secondary to political motivation, impermissible discrimination has occurred violative of the Fifteenth Amendment. *Armour v. State*, 775 F. Supp.

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[27] He also failed to assess the responsiveness of legislators to matters of particular concern to the minority community. J.A. 25. The uncontroverted evidence showed that Democrats in Ohio voted favorably 95% of the time while Republicans voted favorably only 64% of the time. J.A. 196.

[28] Tilling admits that black voters were treated differently than whites under his plan; black districts were singularly at issue as Tilling drew his plan. J.A. 16, 58-64.

1044, 1061 (N.D. Ohio 1991).[29] Intentionally diluting the political effectiveness of minority voters in order to benefit a political party violates the Fifteenth Amendment.[30]

B. Appellants Repeatedly Have Failed to State a Lawful Rationale for Their Race-Based Manipulation of Districts

The Board majority started with an unsupported "policy," rather than objective and factual analysis. That policy produced adverse impacts upon minorities and it persists until the present day. The lack of effort to explore critical facts, combined with the repeated effort to substitute Appellants' manufactured "policy" for facts, supports an adverse inference concerning Appellants' motives. This inference is bolstered by the Board majority's claimed ignorance of Tilling's activities, their delegation of all discretion to him, their awareness of the political advantages of race-based district manipulation, and their adherence to a predetermined policy even in the face of proof that there was no legally significant racial bloc voting. App. D at 133a n.2. Circum-

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[29] *Accord: Jeffers v. Clinton*, 740 F. Supp. 585, 589 (E.D. Ark. 1990), *appeal dismissed*, —— U.S. ——, 111 S. Ct. 1076 (1991); *Flanagan v. Gillmor*, 561 F. Supp. 36, 45 n.20 (S.D. Ohio 1982) (An apportionment plan which "uses racial demography as a factor in considering the political complexion of a district, and [results in] a significant diminution of black voting power" gives rise to an "inference of purposeful discrimination."), *aff'd*, 467 U.S. 1223 (1984).

[30] *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("[I]t is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known, and if not changed, intended."); *Garza*, 918 F.2d at 771; *Ketchum v. Byrne*, 740 F.2d 1398, 1406-10 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Racial gerrymandering claims are justiciable precisely because "there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process." *Davis v. Bandemer*, 478 U.S. 109, 151 (1986) (O'Connor, J., concurring in the judgment).

stantial evidence may be sufficient to show discriminatory intent under the Fifteenth Amendment. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976).[31]

Missing from Appellants' argument is a justification for their boundaries " 'based on legitimate considerations incident to the effectuation of a rational state policy.' " *White v. Regester*, 412 U.S. 755, 764 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)). If Appellants had applied a "rational state policy," *i.e.* the Ohio Constitution, the Board could have accomplished legitimate objectives to make the population in districts more equal through nondiscriminatory means. Where a state agency could have accomplished its purported ends through less segregative or less discriminatory means, a court may infer discriminatory intent and a lack of good faith. *See United States v. Fordice*, —— U.S. ——, 112 S. Ct. 2727, 2744 (1992) (O'Connor, J., concurring).

The trial court concluded there was ample evidence that Appellants employed racial gerrymandering for political gain. App. D at 142-43a & n.9.[32] The plan's intentional race-conscious gerrymander impermissibly minimized black voting strength in violation of the Fifteenth Amendment. *Gomillion*, 364 U.S. at 346. *Accord: Robinson v. Commissioners Court*, 505 F.2d 674, 679 (5th Cir. 1974) ("The most crucial and precise instrument of the . . . denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise

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[31] *Accord: Collins v. City of Norfolk*, 605 F. Supp. 377, 406-07 (E.D. Va. 1984), *aff'd*, 768 F.2d 572 (4th Cir. 1985), *vacated on other grounds*, 478 U.S. 1016 (1986).

[32] *See supra* pp. 4, 6-7, 8-10 (discussing testimony and documents regarding the political advantages of racial gerrymandering and the racially discriminatory effects of the plan).

be a cohesive minority voting community."). It was not coincidental that "Republican Opportunities" detailed a strategy that closely paralleled what Tilling did in packing and fragmenting blacks in Hamilton, Franklin and Montgomery County districts. "[T]he Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the State's power to draw political boundaries." *Bolden*, 446 U.S. at 85 (Stevens, J., concurring).

V. THE SOLICITOR GENERAL'S CALL FOR RACIAL BLOC VOTING AS AN UNCONDITIONAL PREREQUISITE TO A SECTION 2 CLAIM IS SILENCED BY THE SENATE REPORT AND THIS COURT'S PRECEDENT

The Solicitor General would mechanically apply the three preconditions of *Gingles*, which addressed multi-member districts, to the circumstances of this case involving single-member districts. He thereby would forbid Appellees' racial gerrymander claim under Section 2 because there was no finding of legally significant racial bloc voting in Ohio. This position ignores the holding of *Gingles*, the intent of Congress to extend Section 2 to areas without proven histories of discrimination, and the cases condemning racial gerrymandering as a discriminatory "device," regardless of racial bloc voting. It also ignores the admonition of Congress against "mechanical point counting" [33] when applying the Act and the prohibition in the Act against the use of *any* voting practice or procedure that results in dilution of minority voting opportunity. The Solicitor General alternatively argues, with no apparent regard for the facts of this case, that a state is entitled to choose the policies and goals it wants reflected in its apportionment plan. Amicus Curiae of Solicitor General at 13 (S.G.). Yet, Appellants ignored the Ohio Constitution's apportionment requirements and limitations in the name of remedying prior dilution of minority voting strength under the Voting Rights Act.

[33] S. Rep. at 29 n.118, 1982 U.S.C.C.A.N. at 207 n.118.

Thus, the Solicitor General's "local discretion" argument is without merit unless this Court is prepared to hold that state *officials* may ignore the provisions of their state *constitution* and *laws*.

In *Gingles*, this Court specifically stated that it had no occasion to consider whether the standards which it applied to the multimember claim were pertinent "to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember *or single-member districts* resulted in the dilution of the minority vote." 478 U.S. at 46 n.12 (emphasis added). Moreover, though conveniently ignored by the Solicitor General and Appellants, *Gingles* expressly acknowledged that vote dilution may result from racial gerrymandering. "Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Id.* at 46 n.11. The "dispersal" this Court rejected in *Gingles* is identical to the "fragmenting" the trial court held impermissible in this case. The "concentration" this Court disapproved in *Gingles* is on all fours with the "packing" invalidated by the court below. Thus, *Gingles* hardly can be said to stand for the proposition that charges of racial gerrymandering cannot be brought under Section 2, even in areas without a proven history of racial bloc voting.[34]

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[34] When Congress was considering the 1982 amendments it addressed the issue of whether Congressional authority to enact Section 2 was "contingent upon a detailed showing of voting rights discrimination throughout the country." S. Rep. at 41, 1982 U.S.C.C.A.N. at 219. The contingency argument was rejected because it "overlook[ed] Supreme Court decisions subsequent to *South Carolina* [*South Carolina v. Katzenbach*, 383 U.S. 301 (1966)] indicating that Congress can use its Fourteenth and Fifteenth Amendment powers to enact legislation whose reach includes those [jurisdictions] without a proven history of discrimination." *Id.* at 42, 1982 U.S.C.C.A.N. at 220 (citing *Oregon v. Mitchell*, 400 U.S. 112 (1970)). The Report concluded that even "in the absence of a de-

The Solicitor General's argument, in essence, is that Section 2 should not be applied in the absence of a proven record of voting discrimination in the state, *i.e.* historic racial bloc voting. The Senate Report negates the view that any one of the totalities factors, including racial bloc voting must be proved. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. Carried to its logical extreme, the argument would give jurisdictions that had no such racial history a green light to begin engaging in discrimination against minority voters. The Solicitor General also conveniently ignores that his argument that no racial bloc voting existed, directly contradicts Appellants' claim that he purports to support.

The Act disallows *any* state action resulting in "denial or abridgment" of the right to vote on account of race. Indeed, the Solicitor General concedes, as he must, that a state's creation of majority-minority districts "could under some circumstances result in unlawful vote dilution" (S.G. at 10); he therefore must concede that those "circumstances" occur when the "result" is denial or abridgement of voting strength on account of race, the precise finding made by the court below. Since *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960), racial gerrymandering has been recognized as a "sophisticated" mode of racial discrimination, one as equally prohibited as the "simple-minded" discrimination it succeeded. The Senate Report also condemned racial gerrymandering, noting that since 1965 there had been "increased use of the dilution methods addressed by the Supreme Court in *Allen* [*Allen v. Board of Elections*, 393 U.S. 544 (1969)] and *Perkins* [*Perkins v. Mathews*, 400 U.S. 379 (1971)]." S. Rep. at 7, 1982 U.S.C.C.A.N. at 184. *Allen* and *Perkins*, the Report said, involved techniques "which could even in subtle or indirect ways, infringe the right of minority citizens to vote and to have their vote fully count, *e.g.*, gerry-

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tailed record of nationwide voting discrimination," Section 2 was constitutionally permissible. *Id.* at 43, 1982 U.S.C.C.A.N. at 221.

mandering or abolition of electoral posts." S. Rep. at 6-7, 1982 U.S.C.C.A.N. at 183.[35]

Under the Solicitor General's theory, assuming that all of the "subtle stratagems" of minority vote dilution, discussed in *Allen*, were put in place in Ohio and that all of them had a discriminatory effect on black voters, there still could be no violation of Section 2 because there has been no history of racial bloc voting in Ohio. The effect of the theory is to make racial bloc voting a near talismanic prerequisite to a Section 2 violation, in direct contravention of the Senate Report's admonition that no single factor is determinative. S. Rep. at 29 n.118, 1982 U.S.C.C.A.N. at 207 n.118 The Report requires unequivocally that the "relevant factors in a particular case" guide the result. *Id.* The further effect of the Solicitor General's theory is to allow facially neutral violations of the Voting Rights Act to be proven only in a Section 5 state, or in states with other similar simple-minded forms of discrimination.

The Solicitor General's argument, that no Section 2 violation can occur without racial bloc voting, ignores those cases where electoral "practices" may appear facially neutral but have an adverse effect on a small minority group's ability to participate effectively in the political process. In *Chisom v. Roemer*, —— U.S. ——, 111 S. Ct. 2354, 2365 n.24 (1991), this Court made clear that a small minority group continues to be protected by Section 2; to conclude otherwise, according to this Court, is to assume erroneously "that a small group of voters

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[35] *Allen* held that the Voting Rights Act "was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their race." 393 U.S. at 565. Among the subtle stratagems that *Allen* discussed were (1) making an important county office appointive rather than elective; (2) increasing the difficulty for an independent candidate to gain a position on the general election ballot; (3) providing that no person who had voted in a primary election may thereafter be placed on the ballot as an independent candidate in a general election; and (4) creating new procedures for casting write-in votes. *Id.* at 569-70.

can never influence the outcome of an election." Thus, racial bloc voting cannot be applied as an indispensable prerequisite to a Section 2 claim.

In Ohio, where black voters have repeatedly elected their preferred candidates from districts with as little as 35% black population, coalitional voting exists because of substantial white crossover voting. App. D at 141a. Thus, a policy to maximize the creation of majority-minority districts in Ohio, whether under the guise of a per se requirement of federal law or pursuant to "state policy" as the Solicitor General fallaciously suggests, is nothing short of intentional packing and fragmenting of black voters.[36] See *Gingles*, 478 U.S. at 94-95.

The first precondition of *Gingles*, *i.e.*, that blacks must constitute a sufficient population to make up a majority in a district is also presented by the Solicitor General as a per se requirement for single-member districts to bring a vote dilution claim. The argument ignores the factual premise upon which the first precondition in *Gingles* was established. In North Carolina, a Section 5 state where race was the predominant political issue, breaking up a multimember district unable to amass 50% black population would not change the status quo because blacks would still not be able to elect their preferred candidate. *Gingles*, 478 U.S. at 63.

In Ohio, however, even the Appellants concede that blacks have been regularly elected in districts with as low

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[36] *See Williams v. City of Dallas*, 734 F. Supp. 1317, 1415 (N.D. Tex. 1990) (concluding that plaintiffs had established a Section 2 vote dilution claim in part because the packing of blacks into two districts with 75-87% black concentration and 85-91% black and Hispanic population, and the submersion of the remaining black population into nearly all white districts prevented the creation of a third black district); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147, 1157-58 (N.D. Ill. 1983) (court requested redrawing of districts with 75-78% black concentration and 85-91% black and result in vote dilution); Kimbal Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 L. & Pol'y 43, 44 (1988) (supporting the creation of additional districts where possible to "extend the influences of blacks").

as 35% black population. Hence, there is no need to aggregate black voters in excess of 50% in Ohio's state legislative districts, thereby fragmenting other black voters, in order for them to elect a representative of choice. Where the result of such excessive aggregation is dilution, as is the case here, those minority voters remain entitled to Section 2's protection regardless of whether they can constitute a majority. *Chisom*, 111 S. Ct. at 2365 & n.24. The premise that blacks in Ohio cannot elect state legislators of their choice without a majority-minority district is simply unsupported in the record. To the extent the Solicitor General contends that those black voters fragmented by the Appellants' plans cannot bring a Section 2 claim because they cannot form a majority district, he assumes that those voters could not have influenced the outcome of an election, which, according to *Chisom*, is an "erroneous" assumption. *Id.* at 2365 n.24.

Finally, the Solicitor General's argument that Appellants may apply state policy and engage in activity that courts are precluded from is irrelevant in this case. Here, unlike *Wise v. Lipscomb*, 437 U.S. 535, 539-41 (1978), the Board violated the Ohio Constitution, its only source of apportioning authority. The state policy expressed in the Ohio Constitution, that existing boundaries must be observed, was repeatedly violated, a fact which cannot be justified by reference to the Voting Rights Act. Nonetheless, it is disingenuous for the Solicitor General to suggest that the trial court invalidated the plan simply because it maximized majority-minority districts; the court after considering the totality of circumstances found that maximizing majority-minority districts dilutes black voting strength in Ohio in violation of Section 2. App. D at 141-42a.

VI. APPELLANTS' PLAN EXCEEDING TEN PERCENT POPULATION DEVIATION CANNOT BE JUSTIFIED BY ADHERENCE TO STATE POLICY AND THUS VIOLATES THE FOURTEENTH AMENDMENT'S ONE PERSON ONE VOTE REQUIREMENT

To meet the requirements of the Equal Protection Clause, this Court has consistently held that state bicameral apportionment must be completed on a population basis with an "honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable*." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). A deviation percentage that is permissible in one state may not be permissible in another, "depending on the particular circumstances of the case." *Id.* at 578. While the Equal Protection Clause does not require "mathematical exactness or precision" (*id.*), it does require that deviations in fashioning a state apportionment scheme occur as a result of "legitimate" and "rational" state policy such as maintaining the integrity of political subdivisions, compactness and contiguity. *Id.* at 579. *Accord: Connor v. Finch*, 431 U.S. 407, 419 (1977); *Mahan v. Howell*, 410 U.S. 315, 328-29 (1973). Contrary to *Mahan*, 410 U.S. at 326, where the plan "produce[d] the minimum deviation above and below the norm, keeping intact political boundaries," the policy pursued by Appellants ignored political boundaries and needlessly exceeded the 10% limit on population deviation.

A total population variance greater than 10% creates a prima facie case of discrimination which must be justified by the State. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). The total population variance under Appellants' plan is 13.8%. Appellants' Brief at 45 n.40. The trial court properly assessed, and rejected as "erroneous" and as violative of the Equal Protection Clause, Appellants' reliance on "state policy" to justify their greater than 10% population variance in House and Senate Districts. App. D at 148a. Appellants' application of "state policy" was neither consistent nor neutral, and thus was properly rejected by the trial court as justification for

the plan's population deviation. *Id.*; *see Brown*, 462 U.S. at 844-45.

Article XI, §§ 3 and 4 of the Ohio Constitution mandate a total population deviation of 10% from the ideal ratio. App. I at 280-81a (§§ 3 & 4). In addition to §§ 3 and 4, four other provisions of the Ohio Constitution clearly set forth the controlling policy for the apportionment of Ohio's House Districts. App. I at 281-82a (§ 7(A)-(D)).[37] Instead of complying with each of the state apportionment policies mandated by the express provisions of the Ohio Constitution, Appellants picked those they would follow and discarded those they would ignore, purportedly based on adherence to Article XI, § 10(B). Appellants' Brief at 43. However, § 10 states expressly in the preamble that §§ 3, 7, 8 and 9 of Article XI "shall govern the establishment of house of representative districts . . . ." App. I at 283a (§ 10).[38]

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[37] Article XI, § 7(A) provides that districts shall be compact and composed of contiguous territory with a boundary line that is continuous and non-intersecting, and where possible shall contain one or more whole counties. App. I at 281-82a. Section 7(B) provides that where whole counties cannot be used to draw districts compatible with § 3 (providing for 10% total deviation from the ideal population ratio), the district shall be formed by "combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards." App. I at 282a. Section 7(C) provides that where 7(B) cannot be achieved, only one county governmental unit can be divided between two districts "giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named." *Id.* Section 7(D) requires that the new apportionment follow to the extent reasonable, the "district boundaries established by the preceding apportionment." *Id.*

[38] The res judicata issue referenced by Appellants is indefensible. Appellants' Brief at 43 n.39. Justice Holmes was the only member of the majority in the per curiam opinion *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992) who found that the Board majority had standing to assert the constitutionality of their plan. The only issue addressed by the per curiam opinion was that §§ 4, 9 and 11 of the Ohio Constitution are co-equal—no more and no less. *Id.* at 200. Appellees' attempt to remove that case to federal court to address the constitutionality of the plan in light of federal law, was rejected

It is disingenuous for Appellants to assert that they relied on state policy to justify avoiding the ideal population ratio in three House Districts and one Senate District, when they explicitly and unnecessarily ignored the Ohio Constitution on numerous occasions.[39] Such is not the result of "legitimate considerations incident to the effectuation of a rational state policy," addressed in *Reynolds v. Sims*, 377 U.S. at 579-80.

Appellants' repeated, intentional and unnecessary[40] deviations from the requirements of the Ohio Constitution certainly are not consistent or neutral applications of state policy. *See Brown*, 462 U.S. at 844-45,

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for lack of standing. *Id.* at 201 (Moyer, J., concurring). The federal court case, *Quilter v. Voinovich*, now on appeal to this Court was filed to address the failings of the plan under federal law. Res judicata is inapplicable, given the limited issue properly raised and addressed in the *Voinovich* per curiam opinion.

[39] (1) With respect to Article XI, § 7(A), Appellants' plan contained eighteen Ohio counties within whole county districts, where it was possible to place thirty-one Ohio counties within whole county districts. D. 140, Nos. 615-16. (2) Moreover, Appellants ignored § 7(A) in that District 26 is not contiguous. *Id.* at No. 618, D. 114 at 21, Ex. 20 at 22. (3) In Lake County, Appellants failed to draw their districts under § 7(B) which could and should have been done. Instead, the districts were drawn under § 7(C), despite its express language to apply § 7(B) before turning to § 7(C). D. 140, No. 622. (4) On at least 47 occasions more than one governmental unit is divided between two districts in violation of § 7(C). *Id.* at Nos. 624-31. (5) Contrary to § 7(D), Appellants' plan retained only seven House Districts with the same boundaries as the 1981 plan of apportionment. Appellees' submitted plan was able to retain thirty-one districts from the 1981 apportionment and meet each of the constitutional requirements for apportionment in Ohio. *Id.* at Nos. 646-47.

[40] Appellees' plan submitted to the Board on February 18, 1992, although not at issue before the trial court, consistently applied the Ohio constitutional requirements for apportionment and achieved a total population deviation of 10.5%. Where, as shown by Appellees' plan, there exists a better, more consistent means to achieve the state policy with districts "as nearly of equal population as is practicable" (*Reynolds*, 377 U.S. at 577), Appellants' justification based on state policy is properly rejected. *Connor*, 431 U.S. at 420.

848 (O'Connor, J., concurring); *Mahan*, 410 U.S. at 327-28; *White v. Regester*, 412 U.S. 755, 766 n.8 (1973). Appellants' House District variations from the equal population principle resulted from the taint of maximizing the number of "safe" majority-minority districts that packed, fragmented and segregated black voters, and not from consistently applying any state policy. *See Roman v. Sincock*, 377 U.S. 695, 710 (1964) (upholding a state plan where "faithful adherence" to population-based representation allowed for minor deviation where the circumstances were "free from any taint of arbitrariness or discrimination"). Unlike the circumstances in *Brown*, *Mahan* and *White*, the record before the trial court was replete with Appellants' avoidance of the policies of the Ohio Constitution, where those policies could have and should have been followed to satisfy as nearly as practicable the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons, the decisions of the trial court dated March 10 and 19, 1992 should be affirmed, and Appellants' manipulation of black voters in the name of the Voting Rights Act rejected.

Respectfully submitted,

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